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In the

Supreme Court of the United States

October Term, 1952

No. 1

ALBERT E. HUTCHINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 764

EVEREST MELVIN HUPMAN, a/k/a MELVIN E. HUPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i-x) is reported at 219 F. 2d 243.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1955 (Pet. App. xi). A timely

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[1] For the convenience of the Court references to the Court of Appeals' opinion will include both the page reference in the appendix to the petition for certiorari and the page citation in the official report. Like petitioner, we shall use "R." to refer to the printed appendix to appellant's [petitioner's] brief in the Court of Appeals and to the proceedings in that court.

petition for rehearing was denied on March 24, 1955. On April 13, 1955, an order was signed by Mr. Justice Reed extending the time for filing a petition for a writ of certiorari to and including May 2, 1955. The petition was filed on May 2, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the validity of the non-Communist affidavit provision of Section 9(h) of the amended National Labor Relations Act, which this Court sustained in *American Communications Assn.* v. *Douds*, 339 U.S. 382, depends on the particular union officer to whom it is applied.

2. Whether, in a prosecution under the false statements statute (18 U.S.C. 1001), where the alleged false statement is contained in the non-Communist affidavit which Section 9(h) of the National Labor Relations Act requires under certain circumstances to be filed with the National Labor Relations Board, it is necessary that the indictment allege *in haec verba* that the accused filed the affidavit with the Board and that the false statement which it allegedly contained was material to a matter within the Board's jurisdiction.

3. Whether the non-Communist affidavit purportedly signed by petitioner was properly received in evidence in view of the circumstantial evidence that petitioner filed it or caused it to be filed.

4. Whether, where it is alleged and proved that false statements were made "knowingly and will-

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fully," it is necessary to allege and prove in addition that they were made with intent to deceive or defraud the Government.

5. Whether the trial court correctly instructed the jury respecting the credibility of witnesses paid by the Government while posing as members of the Communist Party.

6. Whether evidence admitted against petitioner was procured in a manner violative of his rights under the Fourth Amendment.

7. Whether petitioner was deprived of his right to counsel.

8. Whether petitioner was accorded his right to indictment by a proper and impartial grand jury.

9. Whether petitioner was denied a fair trial as a result of the action of the trial judge in ruling on his proposed instructions to the jury in the jury's presence, in alleged violation of Rule 30 of the Federal Rules of Criminal Procedure.

STATUTES INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), provides:

> No investigation shall be made by the [National Labor Relations] Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of Section 35A of the Criminal Code [now, in pertinent part, 18 U.S.C. 1001, *supra*] shall be applicable in respect to such affidavits.

STATEMENT

The petition for a writ of certiorari seeks review of the judgment of the Court of Appeals for the Sixth Circuit affirming petitioner's conviction

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on a two-count indictment (R. 18-19) charging violations of 18 U.S.C. 1001, *supra*, p. 3. Both counts charged that petitioner made false statements to a government agency, the National Labor Relations Board, in an "Affidavit of Non-Communist Union Officer" which he filed with that agency on January 5, 1950, pursuant to the provisions of Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), *supra*, p. 4. Count 1 charged that he falsely denied being a member of the Communist Party; count 2, that he falsely denied being affiliated with the Party.

The indictment was returned on November 21, 1952, in the United States District Court for the Southern District of Ohio. Prior to the trial, which began January 6, 1954, petitioner moved to dismiss the indictment and challenged the array of jurors. These motions were denied on January 5, 1954.[2] At the completion of the Government's case petitioner moved for a judgment of acquittal and to dismiss the indictment, which motions were denied on January 14, 1954 (R. 575). Petitioner rested his case on January 15, 1954. He renewed the foregoing motions, which were again overruled (R. 606). The jury returned a verdict of guilty on both counts and petitioner was sentenced to im-

[2] These were renewals of motions made originally and denied on January 29, 1953 (R. 29), and June 19, 1953 (R. 45), before an earlier trial, which began August 30, 1953, and ended September 11, 1953, when the jury were unable to agree on a verdict.

prisonment for five years on each count, the terms to run concurrently, and to a fine of $5,000 (R. 628).

The evidence adduced by the Government may be summarized as follows:

Petitioner was an officer of Frigidaire Local 801, United Electrical, Radio and Machine Workers of America (R. 131). Virginia Bantel, as legal examiner for the Cincinnati office of the Labor Board, had the duty of determining the sufficiency of affidavits and other documents received from labor organizations seeking to comply with the requirements of the National Labor Relations Act, and she maintained records showing such compliance (R. 126-128). One of such organizations was petitioner's Union (R. 128). Among the documents received from this Union by Miss Bantel was petitioner's non-Communist affidavit (R. 127), received at the Cincinnati office of the Labor Board on January 5, 1950 (R. 128, 132). The documents being incomplete, Miss Bantel, by letter, requested the president of the Union to furnish additional documents, which were received on January 12, 1950 (R. 138, 145). Following receipt of a further corrective document on January 17, 1950, Miss Bantel notified the Union that it was in compliance with the Act (R. 129), and the documents were sent to the Labor Board office in Washington for permanent filing (R. 137). Although she had no personal recollection of the receipt of petitioner's affidavit and the affidavit contained no identifying marks as to how it reached her office, Miss Bantel, by means of notes in her files (R. 133), maintained

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as an office practice, was able to determine that petitioner's affidavit was received in her office on January 5, 1950 (R. 128, 132). It was accordingly received in evidence (R. 131).

The Government's second witness was John Mitchell, a member of the Communist Party from 1942 to February 1949 (R. 160, 189). Mitchell first became acquainted with petitioner in 1946 (R. 169) when both, card-carrying members of the Communist Party, attended a two-week school in Dayton, Ohio, sponsored by the Party (R. 170). Mitchell testified that petitioner was elected literature director of the Communist Party at Dayton in 1947 and acted in that capacity until early 1949 (R. 180-181). During 1948, Mitchell and petitioner attended executive board meetings of the Communist Party, and during June or July of that year both attended meetings of the Frigidaire Club of the Party, of which both were members (R. 183-184). In February 1949, Mitchell attended a Party meeting at petitioner's home, at which Elmer Fehlhaber, the state press director of the Communist Party, was present (R. 189). Fehlhaber made a report on the progress of the Ohio edition of the "Sunday Worker" (R. 189). Mitchell left the Party after this meeting (R. 189).

The third government witness, Roger Dunham, joined the Communist Party in 1940 to secure information for the FBI on activities of the Communist Party, for which service he received monthly pay from the FBI (R. 266-267). Dunham and petitioner, co-workers at Frigidaire, met at a

Party picnic in 1944 (R. 268-269). Dunham became press director of the Party in 1945, having charge of the distribution of "The Worker" in the Dayton area (R. 273). He testified that petitioner was the literature director for the Party in Dayton in 1947, in charge of pamphlets and books (R. 277). During 1947 and 1948, petitioner was in charge of the purchasing and distribution of such books (R. 278-279). The purchase and distribution of "The Worker" was under the direction of Dunham (R. 276, 280-281). Payments for purchases were made from a bank account in the name of "Worker's Press Club." The signatures of petitioner and Dunham were required on each check withdrawing funds from the account (R. 279). Petitioner also assisted in the distribution of "The Worker" on Sunday mornings during 1947, 1948 and the early part of 1949 (R. 281).

Dunham testified to a specific meeting held at petitioner's home in early 1949 (R. 282). This meeting was attended by Mother Bloor, a prominent Party member (R. 286, 437), who was attempting to raise funds for the defense of the eleven Communists on trial in New York for violation of the Smith Act (R. 441). Petitioner and one Strunk, another government witness, were also present (R. 286, 440). Over $200, part of which was contributed by petitioner, was collected and delivered to Mother Bloor (R. 441-442).

During January or February 1950, Dunham met one Joe Brant, labor organizer for the Communist Party in the State of Ohio, and attended a meeting at the home of petitioner (R. 292, 294). At

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this meeting Brant said to petitioner, "Since you signed this affidavit, the Taft-Hartley affidavit, read the Worker, the literature; don't pay any dues but contribute, support the Party and don't attend any closed meetings." Petitioner replied that "he would go along with that." (R. 295.)

On the same evening, Dunham further testified, petitioner attended another meeting at the home of another Party member (R. 295), at which time petitioner donated $75 to a certain fund which was being collected by the Communist Party in Cleveland, Ohio (R. 298). During September and subsequent months of 1952 petitioner attended four other meetings with other members of the Communist Party to discuss plans and activities of the Party (R. 301-303).

Another government witness, Arthur Strunk, had also joined the Communist Party at the request of the FBI, in 1944 (R. 411, 412). He became financial secretary of the Dayton branch, and held that office from 1945 until at least through 1949 (R. 414, 427, 432). His duties were to collect dues from every Party member and attend executive board meetings (R. 418). He had a list of all members of the Party in Dayton, and petitioner was on the list during these years (R. 418-419). Each year a new list of members of the Party in Dayton was prepared by the members of the executive board at what was called a "re-registration meeting." (R. 422.) Strunk testified that petitioner was elected literature director in 1947 (R. 427), and that he collected dues from petitioner in 1945 (R. 419) and 1947 (R. 428).

Strunk's testimony corroborated that of Mitchell with respect to the 1949 meeting at petitioner's home at which Fehlhaber was present (R. 189, 436) and the testimony of Dunham relating to the March 1949 meeting in petitioner's home at which Mother Bloor was present (R. 286, 437-438). On December 3, 1949, Strunk attended a meeting in petitioner's home at which petitioner, his wife, and Martin Chancey, the Ohio state chairman of the Communist Party, were present (R. 442-443). At this meeting, speaking of the forthcoming "signing" of the "Taft-Hartley affidavits", Chancey said, "five Communist Party members would have to sign the Taft-Hartley affidavit, and the same five should not attend any meetings after they had signed it, not pay any dues; just donate every month so much money. They should meet as an individual group, which would be called the Taft-Hartley group" (R. 444).

Strunk further testified that during 1950 the "Taft-Hartley group" was added to three other such groups already in existence in Dayton (R. 446-448). At a meeting at petitioner's home in 1950 (R. 453) petitioner was re-registered, taken from the "Frigidaire group," and placed in the "Taft-Hartley group" (R. 448). The "Taft-Hartley group" consisted of petitioner and four other Party members who had signed affidavits, one of whom was the president of petitioner's union (R. 456-457).

ARGUMENT

1. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, this Court upheld the constitutionality

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of Section 9(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947 (29 U.S.C. 159(h)). See also *Osman* v. *Douds*, 339 U.S. 846. The Court held that the non-Communist affidavit provision of that section was a valid exercise of congressional power to protect commerce from the evils of disruptive, politically inspired strikes. Petitioner in effect asks the Court to reexamine its decisions in those cases (Pet. 24). In his attempt to show that Section 9(h) is unconstitutional as applied to him, petitioner quotes out of context two passages from the Court's first opinion, and argues that the validity of the section depends on the particular union officer to whom it is applied (Pet. 25). There is plainly nothing in the *Douds* opinions which warrants such a conclusion. Section 9(h) validly applies to all responsible union officers whose unions desire to utilize the services of the National Labor Relations Board.[3]

2. Petitioner contends (Pet. 37-42) that the Government failed to charge and prove (a) the filing of the affidavit and (b) the materiality of the statements contained therein.

While the filing of a false affidavit with the National Labor Relations Board is necessary to con-

[3] The fact that this was a criminal prosecution under the false statements statute (18 U.S.C. 1001) for willfully executing and filing a false §9(h) affidavit is not, contrary to petitioner's apparent contention (Pet. 23-24), a factor warranting reconsideration by this Court of its decisions sustaining the constitutionality of Section 9(h). As the Court observed in *Douds*, 339 U.S. at 412-413, the "criminal punishment specified" in Section 9(h) is that provided for by 18 U.S.C. 1001. See *United States* v. *Gilliland*, 312 U.S. 86, 93.

stitute the crime under 18 U.S.C. 1001 with which petitioner was charged (*United States* v. *Valenti*, 207 F.2d 242 (C.A. 3)), there is no requirement that the indictment allege the filing of the affidavit *in haec verba*. This indictment charged (R. 18-19) that petitioner, "in a matter within the jurisdiction of the National Labor Relations Board, * * * did unlawfully, willfully, and knowingly in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081) make a false, fictitious and fraudulent statement and representation * * * ." This charged the essential elements of the offense in substance. An indictment or information is sufficient if it alleges the essential elements of a crime with enough particularity to apprise the defendant of the nature of the charge and to enable him to protect himself from a subsequent prosecution for the same offense. *Hagner* v. *United States*, 285 U.S. 427, 431; *Todorow* v. *United States*, 173 F.2d 439, 447 (C.A. 9), certiorari denied, 337 U.S. 925. The Government proved by the testimony of witness Bantel (*supra*, pp. 6-7) that the affidavit of petitioner was among the papers submitted by the president of petitioner's union on January 5, 1950. This, when considered together with Dunham's testimony as to the conversation between petitioner and Brant as to how petitioner should conduct himself now that he had "signed this affidavit" (*supra*, pp. 8-9) and Strunk's testimony as to petitioner's being included in the "Taft-Hartley group" of Communists (*supra*, p. 10), sufficed to prove that petitioner had filed the affidavit or

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caused it to be filed. The Court of Appeals was correct in holding that "* * * the record presents circumstances which warrant a reasonable inference that the appellant signed and either filed, or caused to be filed, the affidavit here involved" (Pet. App. vii; 219 F.2d at 247).

Similarly without merit is the contention (Pet. 40-42) that the indictment "fails to allege either in *haec verba* or otherwise that the alleged false statements were *material statements* to a matter within the jurisdiction of a department of the United States" (Pet. 40), and that it was therefore fatally defective.[4] *Rolland* v. *United States*, 200 F.2d 678 (C.A. 5), certiorari denied, 345 U.S. 964, on which petitioner relies (Pet. 40), merely states that an indictment which charges a violation of 18 U.S.C. 1001 must allege that the false statements were material or allege facts from which their materiality appears. The indictment in this case conformed to that rule. Although the word "material" was not used, the materiality of the false statements was charged in substance by virtue of the allegations (R. 18-19) that petitioner, "in a matter within the jurisdiction of the National Labor Relations Board," "did unlawfully, willfully, and knowingly, in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081)," make "false, fictitious and fraudulent statement[s], * * * to wit, that he was not a member of the Communist

[4] Petitioner, it should be noted, does not urge that the statements in question were not in fact material, since they plainly were, but merely that they were not stated in the indictment to be material.

Party" (count 1) and that he "was not affiliated with the Communist Party" (count 2); and that these statements were known by petitioner to be false at the time he made them. These allegations showed that the false statements were material to the proper exercise of jurisdiction by the Board; hence the indictment was sufficient. *United States* v. *Cowart*, 118 F. Supp. 903 (D.D.C.).

3. Petitioner also argues (Pet. 35-37) that Government's Exhibit No. 1, his non-Communist affidavit, was improperly admitted into evidence. The contention, however, seems to be based on a misunderstanding of the opinion of the Court of Appeals.

Petitioner appears to believe that the Court of Appeals held the affidavit to have been properly admitted as being within the purview of 28 U.S.C. 1733, which provides for the admission of government records. He states (Pet. 35) that the Court of Appeals held that the affidavit had been properly admitted because "it was made upon a printed form provided by the Labor Board and appears to be regular upon its face." The Court of Appeals, however, did not adopt this theory of admissibility (see Pet. App. v-vi; 219 F.2d at 247). The court observed that there was more evidence on this point than the mere fact that the affidavit was found in the Labor Board files, namely, the testimony of government witnesses Dunham and Strunk (Pet. App. vi-vii; 219 F.2d at 247). It was on the basis of this testimony that the court concluded that the record presented circumstances which warranted the rea-

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sonable inference that petitioner had gned the affidavit and either filed it or caused io be filed (Pet. App. vii; 219 F.2d at 247). In]ding that circumstantial evidence may aid in thenthentication of a document, the court has not p forth any new legal theory. Although writingsnust generally be proved genuine before they ay be admitted in evidence, their genuineness n be established by indirect or circumstantial evi nce. *State* v. *Davis*, 203 N.C. 13, 28, 164 S.E. 737,45, certiorari denied, 287 U.S. 649; *People* v. *Mannaro*, 218 N.Y. 9, 13, 112 N.E. 436, 438. It is likewe well established that a defendant in a crimin case may be connected with the writing or mailinof a document by circumstantial as well as dire evidence. *Ford* v. *United States*, 10 F.2d 339, 35 (C.A. 9), affirmed, 273 U.S. 593; *Hartzell* v. *Uned States*, 72 F.2d 569, 578 (C.A. 8), certiorari enied, 293 U.S. 621; *Cochran* v. *United States*, 4 F.2d 193 (C.A. 8).

4. The false statements statute (18 U.S.C. 1001) provides for the punishment of anyone ho "knowingly and willfully" makes any false stement in any matter within the jurisdiction of ny department or agency of the United States. Petitioner urges (Pet. 42-44) that it is necessary hat an indictment under this statute allege, an the proof establish, not merely that a false stæment was "knowingly and willfully" made, but hat it was made "with an intent to deceive or efraud the Government" (Pet. 42-43). The contenion is without merit. "The question in any crimial prosecu-

tion involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied * * *." *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413; cf. *Walker* v. *United States*, 192 F.2d 47, 49 (C.A. 10). "Willfully" means "deliberately and with a specific purpose to do the acts proscribed by Congress." *Hartzel* v. *United States*, 322 U.S. 680, 686. No further intent needed to be alleged or proved.

5. Petitioner contends (Pet. 45-47) that the trial court did not properly instruct the jury with respect to the credibility to be accorded the government witnesses who had posed as Communist Party members while in the employ of the FBI. The instruction requested by petitioner (R. 651) appears to have been constructed by combining two passages from the opinion of the Court of Appeals for the District of Columbia Circuit in *Fletcher* v. *United States*, 158 F.2d 321, which petitioner erroneously supposes to have laid down an invariable verbal formula for inclusion in instructions to the jury in informer cases. *Fletcher* was a narcotics case in which the sole evidence against the defendant was the testimony of a single, paid addict-informer. The court held that the jury should have been instructed that the testimony of the informer "should be examined by the jury with greater scrutiny and care than the testimony of an ordinary witness." In the instant case the Government's evidence consisted of the mutually corroborative testimony of several witnesses as well as petitioner's non-Communist affidavit itself, so that it is plainly distinguishable on its facts

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from *Fletcher*. Even so, the substance of the *Fletcher* instruction was given here when the jury were told that they should "examine it [the testimony of Strunk and Dunham] with greater than ordinary scrutiny" (R. 617). This, in the context of the cautionary instruction as a whole (R. 617-618), adequately protected petitioner's rights.

6. Also without merit is petitioner's argument (Pet. 19, 44-45) that his conviction violated the Fourth Amendment in that it rested upon evidence obtained through an illegal search and seizure. The witness Dunham testified on cross-examination (R. 342) that while he was living in petitioner's home with petitioner's consent he took notes concerning petitioner's books and personal effects. However, he said, he did not recall the substance of the notes and he did not have the notes at the time of the trial (R. 343). He did not testify as to any of the information so acquired (R. 408), and there is nothing to indicate that any such information served in any manner as a link in the chain of evidence in the case. *Gouled* v. *United States*, 255 U.S. 296, on which petitioner relies, is thus clearly distinguishable from this case. There, entry to the premises had been secured by fraud and at the trial one of the documents seized was introduced into evidence.

7. Another of petitioner's claims (Pet. 21, 45) is that his Sixth Amendment right to the assistance of counsel was violated in that witness Dunham obtained information from petitioner regarding his trial preparations and defense plans. On

cross-examination, Dunham testified (R. 372-374) that he learned from petitioner about preparations for his defense. There was, however, no invasion of the privacy of the counsel-client consultations. Cf. *Coplon* v. *United States*, 191 F. 2d 749 (C.A. D.C.), certiorari denied, 342 U.S. 926; *Caldwell* v. *United States*, 205 F. 2d 879 (C.A. D.C.). In this case all of petitioner's consultations with his counsel were private. It was petitioner himself who disclosed the plans of the defense to Dunham. And Dunham's testimony reveals that he had not been requested by the FBI to seek such information. (R. 373.) So far as appears from the record, petitioner made no further point of this matter other than to move for leave to question Dunham about it again at the conclusion of the Government's case (R. 574). We submit that there was no violation of his right to the assistance of counsel within the meaning of the Sixth Amendment.

8. Petitioner further contends (Pet. 47-49, 21-23) that his right to indictment by a proper and impartial grand jury was violated because, he says, the record reveals "a total delegation of the selection of the grand jury to persons other than the jury commissioner, the clerk or his deputy" (Pet. 21). This contention is likewise without merit. The fact that the jury commissioner and his clerk acquired the names of prospective jurors from prominent citizens did not constitute a delegation of the duty to select the jurors. The jury commissioner and clerk did not empower any one to act for them in the discharge of their responsibilities. The law

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does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors. *Walker* v. *United States*, 93 F. 2d 383, 391 (C.A. 8), certiorari denied, 303 U.S. 644.

A lack of proportionate representation of classes of citizens on grand jury panels which is not shown to be deliberate and intentional does not violate the Constitution. *Fay* v. *New York*, 332 U.S. 261, 291; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Frazier* v. *United States*, 335 U.S. 497, 504. The recent decisions of this Court which have invalidated indictments because of defects in the methods of selecting grand jurors have all involved systematic exclusion from the panel of entire classes of persons, such as women, *Ballard* v. *United States*, 329 U.S. 187; Negroes, *Cassell* v. *Texas*, 339 U.S. 282; or Americans of Mexican descent, *Hernandez* v. *Texas*, 347 U.S. 475. There was no such showing here. Cf. *United States* v. *Dennis*, 183 F. 2d 201, 216 *et seq.* (C.A. 2), certiorari denied on this point, 340 U.S. 863; *United States* v. *Flynn*, 216 F. 2d 354, 384 *et seq.* (C.A. 2), certiorari denied, 348 U.S. 909.

9. Finally, petitioner argues (Pet. 50-52) that he was denied a fair trial as a result of the action of the trial judge in ruling on his requested instructions to the jury in the jury's presence in alleged violation of Rule 30, Federal Rules of Criminal Procedure.[5] The facts are as follows:

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[5] Rule 30 provides in pertinent part: "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the

After the opening summation by the Government the trial judge called counsel to the bench and notified petitioner's counsel, in conformance with the provisions of Rule 30 (fn. 5, *supra*), that three of his requested instructions would be given in the form requested and that the remainder would be given in substance (R. 600-603). Subsequently, during petitioner's summation, when counsel started to discuss the authentication required for petitioner's non-Communist affidavit, the judge interrupted to remind him that he had ruled on the admissibility of the document and that the jury would be instructed that they could consider circumstantial evidence tending to elucidate the signing and filing of the affidavit (R. 604-605). It is this action which petitioner contends violated the procedure prescribed in Rule 30. The claim is groundless.

The judge at a federal trial is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95; *Quercia* v. *United States*, 289 U.S. 466, 469. He may comment on the evidence and even express an opinion respecting the weight of such evidence. *Horning* v. *District of Columbia*, 254

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court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. * * *."

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U.S. 135. Here the judge merely reminded defense counsel of his ruling on the affidavit and informed him of the instruction he proposed to give to the jury (R. 604). It is difficult to see how this statement could have been prejudicial to petitioner, since the judge had ruled several days earlier that it was not necessary for the affidavit to be authenticated in the manner petitioner claimed was required (R. 130).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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